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No. 03-1055

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STEVEN H. STERN, Individually, and as Trustee of the Steven H. Stern, Inc. Profit Sharing Plan,

Cross-Petitioners,

v.

DAVID A. GILL, Chapter 7 Trustee,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT

REPLY BRIEF

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I.

INTRODUCTION

The issue posed by the Conditional Cross-Petition is whether an ERISA-qualified plan can be considered to have lost its qualified status by the mere attrition of employees prior to a given participant's bankruptcy petition date. Stated otherwise, the issue is whether a plan that was properly qualified under ERISA at the outset loses it qualifying status where no administrative action is taken to terminate or disqualify the plan but changes occur in the employer's work force. In addition, the Court is asked to determine when a plan's qualifications should be judged.

Cross-Respondent does not address any of the issues raised in the Conditional Cross-Petition, nor does he adequately address the conflicts among the circuits. Instead, Cross-Respondent summarily dismisses the Conditional Cross-Petition, with no analysis whatsoever. Cross-Respondent's inability to directly confront, much less refute, the Conditional Cross-Petition confirms that this Court should grant it, in the event it grants the Petitioner's petition for writ of certiorari.

II.

ARGUMENT

A. The Cross-Respondent Did Not Address the Important Public Policy Issues Discussed in the Conditional Cross-Petition.

In his Conditional Cross-Petition, Cross-Petitioner stressed several important public policy issues raised by the ERISA qualification aspects of the Ninth Circuit's opinion in *Stern*. These policy issues include the uniform, national treatment of pension benefits;[1] Congress' desire that a participant's interest in a pension plan be safeguarded; and Congress' desire to impose strict limits on the circumstances in which the plan's funds could be invaded. 29 U.S.C. § 1341(a). The Ninth Circuit in the *Stern* decision created a judicial exception to Title I of ERISA because it found that a plan's ERISA's qualification can change on the mere happenstance of employee attrition and without regard to the fact that no statutory formalities relative to the termination of plan benefits were followed. In other words, a plan that previously qualified under ERISA was considered to have lost its ERISA status merely because the previously qualifying employee married another participant prior to the participant's bankruptcy petition date.

While Cross-Respondent acknowledges that employee attrition is an issue, he then completely misstates the point. In his attempt to neutralize the important policy concerns addressed in the Conditional Petition, Cross-Respondent

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1. Conditional Petition at page 9; *Patterson v. Shumate*, 504 U.S. 753, 761, 112 S. Ct. 2242, 2248, 119 L. Ed 2d 519 (1992).

relies on *In re Lowenshuss*, 171 F.3d 673 (9th Cir, 1999), *cert. denied*, 528 U.S. 877 (1999) to support the assertion that the participant's bankruptcy petition date is the operative date for determining a plan's qualifications. Conditional Opposition at pg. 2. However, there is no dispute between the parties that prior to her marriage to Steven H. Stern, Maggi Mayersohn was a qualifying employee of the Steven H. Stern, Inc. Profit Sharing Plan. *Gill v. Stern (In re Stern)*, 345 F.3d 1036, 1039, 1041 (9th Cir. 2003). Since Ms. Mayersohn and Mr. Stern were married before the filing of Mr. Stern's bankruptcy petition, Cross-Respondent submits that no qualifying employee existed *as of the petition date*. Conditional Opposition at pgs. 2-3. However, it is the Ninth Circuit's misguided rationale in the *Lowenshuss* case — the same rationale that it used in the *Stern* decision — that the Court is now called upon to scrutinize. Cross-Respondent never says why *Lowenshuss* was correct, and he intentionally avoids the important policy issues raised in the Conditional Petition, such as the notion that if Stern and Mayersohn strategically divorced the day before Stern filed for bankruptcy, under Cross-Respondent's view, ERISA qualification would spring back to life. It is unlikely that Congress intended that this important plan qualification issue turn on whether the employee divorced the owner prior to the petition date. Cross-Respondent's evasive argument speaks loudly to the importance of these issues and the fact that this Court should provide guidance to all person affected by them.

B. The Conditional Opposition Does Not Refute the Fact That the Ninth Circuit's Ruling Conflicts with the Decisions of Other Circuits.

The Cross-Respondent attempts to distinguish some, but not all, of the cases cited in the Conditional Petition that demonstrate that the Ninth Circuit's opinion conflicts with other circuit decisions. The cases cited in the Conditional Cross-Petition, including this Court's own precedent, the Seventh Circuit and several district court decision, illustrate this conflict. *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992); *In re Baker*, 114 F.3d 636 (7th Cir. 1997); *Kaler v. Craig (In re Craig)*, 204 B.R. 750 (D.N.D. 1996); *In re Kaplan*, 162 B.R. 684 (Bankr. Ed. Pa. 1993). These cases all demonstrate that where the company originally had other qualifying employees, the plan did not lose its ERISA status because those employees were no longer employed by the firm, even if the only remaining participant as of the participant's bankruptcy petition was the majority shareholder, president or chairman of the company. The Ninth Circuit in *Stern* reaches the opposite conclusion.

In order to sidestep the conflict among the circuits, the Cross-Respondent argues that the Stern Plan *never* had a qualifying employee. Conditional Opposition at pg. 4. That assertion is incorrect. *Gill v. Stern (In re Stern)*, 345 F.3d 1036, 1039; 1041 (9th Cir. 2003). Yet that is the only basis upon the Cross-Respondent can distinguish Cross-Petitioner's cited authorities. For instance, while Cross-Respondent acknowledges the Fourth Circuit's opinion in *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1993), he attempts to distinguish the case by asserting that "there is no dispute here that there were no other arm's length employees and therefore *Madonia* is

inapplicable." Conditional Opposition at pg. 4.[2] That statement is incorrect. *What is without dispute is that Ms. Mayersohn was a qualifying employee and an active participant in the plan prior to her marriage to Mr. Stern.*

Similarly, Cross-Respondent incorrectly applies the Seventh Circuit's opinion in *In re Baker*, 114 F.3d 636 (7th Cir. 1997) because he again omits that Ms. Mayersohn was a qualifying employee. Instead, the Cross-Respondent summarily dismisses the conflict presented in *Baker* by claiming that "the attrition issue is not present." Conditional Opposition at pg. 4.

Moreover, Cross-Respondent does not even address the conflict raised with this Court's own opinion in *Patterson*. Neither does he acknowledge the other cases cited by the Cross-Petitioner such as *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995); *Anderson v. Emergency Associates*, 860 F.2d 987 (10th Cir. 1988); *Sage v. Automation, Inc. Pension Plan*

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2. Cross-Respondent contends that Cross-Petitioner asserts that the principal conflict is with *Madonia*. Conditional Opposition at pg. 3. However, the Conditional Cross-Petition demonstrates that the "principal conflict" is with the Seventh Circuit, this Court's own precedent and various district court cases. *See Patterson v. Shumate,* 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992) (court presumed that the plan was qualified under ERISA even though the bankruptcy petition date, the only remaining employee under the firm's pension plan was the president and chairman of the closely held corporation); *In re Baker*, 114 F.3d 636 (7th Cir. 1997) (relying on *Patterson*, held that plan was ERISA qualified although the only participant as of the bankruptcy petition date was the corporation's majority shareholder); *Kaler v. Craig (In re Craig)*, 204 B.R. 750 (D.N.D. 1996) (plan remained ERISA qualified although all qualifying employees cashed out prior to sole shareholder's bankruptcy petition).

and Trust, 845 F.2d 885 (10th Cir. 1998); *Kaler v. Craig (In re Craig)*, 204 B.R. 750 (D.N.D. 1996) or *In re Kaplan*, 162 B.R. 684 (Bankr. E.D. Pa. 1993). The importance of these cases is discussed in detail in the Conditional Petition.

Cross-Respondent attempts to distinguish *Yates v. Hendon*, 287 F.3d 521 (6th Cir. 2002), *cert. granted*, __ U.S. __, 123 S. Ct. 2637, 156 L. Ed 2d 654 (2003) from this case. However, as pointed out by Cross-Petitioner, this case presents the Court with an important *complement* to *Yates*. The Cross-Petitioner never claimed that the issues were identical.

III.

CONCLUSION

The Cross-Petitioner respectfully submits that the Court should decline to grant the Petitioner's writ of certiorari. In the event, however, that the Petitioner's writ is granted, this Court should also grant the Conditional Cross-Petition to enable it to clarify issues swirling around the uncertainty as to when a plan must qualify as an employee benefit plan under ERISA. In addition, the Court should provide guidance as to whether a plan that is otherwise qualified under Title I of ERISA can lose its qualifying status by the mere attrition of employees.

Respectfully submitted,

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